

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

JON W. GUMBLE,

Defendant-Appellant.

UNPUBLISHED

October 26, 2001

No. 221263

Oakland Circuit Court

LC No. 86-075225-FC

Before: Doctoroff, P.J., and Murphy and Zahra, JJ.

ZAHRA, J. (*concurring*).

I concur in the result reached by the majority. I write separately because I conclude that the trial court clearly erred when it found the prosecutor disclosed to defense counsel the 1988 police report documenting the Ridenour statement. I conclude that the great weight of the evidence supports the conclusion that the Ridenour statement was not provided before the third trial. I further conclude that this evidence, corroborated by Deaton and by the Mayberry confession, would have resulted in a different disposition of this case.

While this Court reviews a motion for new trial based on newly discovered evidence in its totality for an abuse of discretion, we have traditionally reviewed specific factual findings reached after an evidentiary hearing for clear error. *People v Douglas*, 122 Mich App 526, 529; 332 NW2d 521 (1983), citing *People v D'Angelo*, 401 Mich 167, 183; 257 NW2d 655 (1977). Clear error is established when a court reviewing the record is left with a definite and firm conviction that a mistake has been made. *People v Brzezinski*, 243 Mich App 431, 433; 622 NW2d 528 (2001). This standard gives deference to the factfinder, who is afforded the opportunity to observe and judge the demeanor and credibility of the witnesses while testifying. Significantly, however, this standard is less deferential to the conclusions reached by the trial court than the abuse of discretion standard. Under the abuse of discretion standard of review, reversal is warranted only where the trial court's decision is so grossly violative of fact and logic that it evidences the perversity of will, a defiance of judgment, and the exercise of passion or bias. *People v Gadomski*, 232 Mich App 24, 32; 592 NW2d 75 (1998).

For the reasons stated in the majority opinion at page 4, I am left with the definite and firm conviction that the trial court clearly erred when it found the prosecutor produced the Ridenour report to defense counsel. The prosecutor did not specifically recall producing the Ridenour report. Rather, she relied on her conclusion that she produced her entire discovery file, including a tabulated index of police reports that she believed included the Ridenour report. In

contrast, defense counsel testified he did not receive the report and, if he had, he would have adopted a different trial strategy. Defense counsel testified that he was aware of the Deaton statement but elected not to call Deaton because he was incarcerated on a child molestation conviction at the time of trial. Defense counsel indicated he would have called both Deaton and Ridenour had he been aware of Ridenour's existence.

Moreover, assuming the prosecution failed to provide the Ridenour report to defense counsel, a review of the remaining record strongly supports the conclusion that defense counsel was adequately prepared for trial and exercised acceptable professional skill and judgment throughout the trial.¹ The trial court's conclusion that defense counsel received the Ridenour statement may well have been based upon defense counsel's professional record in other matters, which are wholly irrelevant to these proceedings. I conclude that these circumstances establish the trial court clearly erred in finding defense counsel had possession of the Ridenour report. Accordingly, I would reverse defendant's convictions based on the newly discovered evidence, not the alternate theory of ineffective assistance of counsel on which the majority relies.²

/s/ Brian K. Zahra

¹ The only basis for concluding that counsel was ineffective is the fact that Ridenour and Deaton were not called in the defendant's case. Moreover, defense counsel's failure to adhere to the trial court's rulings, which resulted in a mistrial, evidences that defense counsel was overly zealous in his representation of defendant, not that he was predisposed to neglect defendant's case to the point that counsel's representation became ineffective.

² It is noteworthy that the prosecution, even when faced with a claim that it failed to provide discovery in a capital case, elected not to file a brief in this appeal.